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AUG 30 2013

King County Prosecutor  
Appellate Unit

No. 70108-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR FERNANDEZ,

Appellant.

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On Appeal from the King County Superior Court  
The Honorable Laura Gene Middaugh, Judge

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BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
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Seattle, WA 98122  
(206) 623-2373

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COURT OF APPEALS  
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred when it ordered appellant to pay \$7,201.75 in restitution to one of appellant's victims.<sup>1</sup>

Issue Pertaining to Assignment of Error

Appellant pled guilty to stealing two cars. One of the victims claimed that, although his insurer had reimbursed him for the loss of his car, the insurer would not cover the value of aftermarket specialty items he had installed on the vehicle prior to its theft. The victim did not, however, submit any documents from the insurer establishing how much and for what he had been reimbursed. Oddly, the insurer did not ask for reimbursement or submit any paperwork, either. Where the trial court's ultimate restitution decision necessarily relied on speculation and conjecture, should \$7,201.75 be stricken from the restitution order?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Victor Fernandez with two counts of Theft of a Motor Vehicle and two counts of Possession of a Stolen Vehicle related to the theft and destruction of: (1) a 2000 Honda Civic belonging to Michael Spacek

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<sup>1</sup> The court's Order Setting Restitution is attached to this brief as an appendix.

and (2) a 1998 Acura Integra belonging to Bettejane Hargrove. Fernandez was alleged to have been involved in taking both vehicles and subsequently stripping them of their usable parts. CP 1-10.

The parties negotiated a plea agreement. In exchange for guilty pleas to the two theft charges, the State did not pursue the two possession charges. CP 11-22, 32. Fernandez agreed to pay restitution for all losses. CP 32.

Prior to sentencing, the State submitted paperwork in support of its restitution request. CP 49-88. Most of the paperwork pertains to Ms. Hargrove's Acura and clearly establishes that Fernandez owes Hargrove \$533.69 and her insurer (State Farm) \$5,559.51. CP 47, 50-73. Fernandez's obligations are joint and several with certain co-defendants. CP 47-48. These obligations and amounts are not in dispute. RP 3, 7.

In contrast to the detailed paperwork submitted by Hargrove and State Farm, Spacek merely indicated on a Victim Loss Statement that his insurer was Encompass, he had a \$500.00 deductible, and Encompass had reimbursed him for "car only no aftermarket." CP 74. He then attached Internet screenshots from several websites identifying the aftermarket items that had been added to his Civic and the costs to replace them. The total claimed

loss on these items was \$7,201.75. CP 75-87; RP 3. Encompass did not seek reimbursement for what it had paid Spacek, and Spacek submitted no documentation from Encompass. CP 74-87; RP 7-8.

Defense counsel objected to Spacek's request, arguing the submitted documentation, without more, was insufficient. RP 3, 7. Counsel questioned Spacek's claimed losses given that Encompass had compensated Spacek for his car and noted the absence of any paperwork from Encompass indicating how much had been paid and for what. RP 5, 8. Counsel also objected to reimbursement for the \$500.00 deductible in the absence of any paperwork. RP 6.

In support of Spacek's request, the prosecutor argued Encompass was unwilling to reimburse Spacek for the inflated value of his Civic given the aftermarket upgrades. RP 13. Defense counsel responded that, without paperwork from Encompass, it was impossible to determine whether Spacek had already been compensated for his claimed losses. RP 14. He may have been "double dipping." RP 13.

The Honorable Laura Middaugh found it "a little odd" that Encompass did not make a claim for reimbursement. RP 7-8. She also indicated she was "a little confused about the total amount paid

by insurance.” RP 12-13. Moreover, she expressed confusion about why a transmission – for which Spacek was requesting restitution – would not have already been covered by Encompass. RP 15. The prosecutor guessed that “maybe” Spacek raced his car and the transmission made it faster. RP 15.

Ultimately, Judge Middaugh ordered Fernandez to make restitution for everything but the \$500.00 deductible, finding it “very weird that we don’t have anything from the insurance company.” RP 16. Fernandez was ordered to pay Spacek \$7,201.75. CP 47. He timely filed his Notice of Appeal. CP 89-91.

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT ORDERED  
RESTITUTION FOR THE AFTERMARKET CAR PARTS  
WITHOUT SUFFICIENT PROOF OF SPACEK’S LOSSES.

A trial court’s authority to impose restitution is controlled by statute. State v. Hiatt, 154 Wn.2d 560, 563, 115 P.3d 274 (2005). Restitution is authorized “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property . . . .” RCW 9.94A.753(5). Restitution orders are reviewed for an abuse of discretion. State v. Dauenhauer, 103 Wn. App. 373, 377, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011, 21 P.3d 291 (2001).

“If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence.” State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While certainty of damages need not be shown with specific accuracy, the court must not engage in mere speculation or conjecture, and the amount of restitution must be supported by substantial credible evidence. State v. Pollard, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). “Notwithstanding the forgiving abuse of discretion standard, the record must permit a reviewing court to determine exactly what figure is established by the evidence.” Id.

The documentation of Spacek’s losses falls short of these standards. Spacek failed to submit anything from Encompass documenting what he had been paid for the loss of his Civic and why his insurer would not cover any losses pertaining to aftermarket additions to the car. Moreover, even if it is assumed Encompass refused to cover the *additional* value from the aftermarket products, presumably Spacek received *something* for a standard stereo, a standard suspension, a standard exhaust system, and a standard transmission. Yet, he sought and received the complete replacement value for all the upgraded parts. See CP 75, 77-78, 83

(stereo); CP 80, 85 (suspension); CP 84 (exhaust); CP 86 (transmission). Without any proof of what Encompass paid Spacek for these same losses, the court's restitution ruling is mere speculation and conjecture.<sup>2</sup>

Fernandez's case stands in contrast to a case like State v. Bennett, 63 Wn. App. 530, 821 P.2d 499 (1991). In Bennett, the defendant was convicted of burglary after unlawfully entering her mother's home and taking property. Bennett, 63 Wn. App. at 531. In affirming the restitution award, this Court noted that the victim had provided a list of possessions stolen and insurance company worksheets. Id. at 535. As to the latter, this Court said, "We perceive no reason to question the reliability of the insurance company's accounting of [the victim's] loss, given an insurer's strong financial interest in not overpaying claims." Id. at 536 n.4.

Had Spacek submitted similar documents from Encompass revealing the amount and nature of his prior reimbursement, there would be no reason to question the reliability of his requested amounts, either. Judge Middaugh herself recognized it was "a little

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<sup>2</sup> Fernandez recognizes that payment of a policy limit may not cover a victim's total losses. See State v. Young, 63 Wn. App. 324, 335 n.8, 818 P.2d 1375 (1991). But it is impossible to determine from the record whether this is true regarding Mr. Spacek.

odd” that Encompass did not make a claim for reimbursement, it was unclear how much Encompass had already paid, and it was “very weird” there were no documents prepared by Encompass. RP 7-8, 12-13, 16. Without documentation from Encompass explaining what had been paid, it was impossible for Judge Middaugh to accurately determine Fernandez’s proper obligation.

Where the defense objects to a particular restitution request, and the State fails to carry its burden on that request, the proper course is to vacate the restitution amount in question. The State does not get a second chance to prove the claim. State v. Dennis, 101 Wn. App. 223, 228-230, 6 P.3d 1173 (2000).

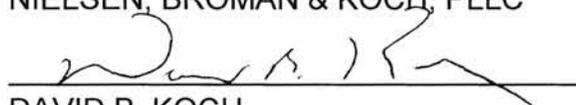
D. CONCLUSION

This Court should remand for entry of a new order limited to reimbursement for Ms. Hargrove and her insurer, State Farm.

DATED this 30<sup>th</sup> day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



\_\_\_\_\_  
DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## APPENDIX

FILED  
KING COUNTY CLERK OF COURTS

FEB 22 2013

SUPERIOR COURT CLERK  
BY DAVID J. ROBERTS  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 VICTOR L. FERNANDEZ, )  
 )  
 ) Defendant, )

No. 12-C-02921-7 SEA  
  
ORDER SETTING RESTITUTION

The court ordered payment of restitution as a condition of sentencing. The Court has determined that the following persons are entitled to restitution in the following amounts;  
IT IS ORDERED that defendant make payments through the registry of the clerk of the court as follows:

Bettejane Hargrove  
C/O King County Clerk's Office  
516 3<sup>rd</sup> Ave, 6<sup>th</sup> Floor  
Seattle, WA. 98104  
AMOUNT \$ 533.69

State Farm  
Attn: Subrogation  
PO Box 52299  
Phoenix, AZ 85072-2299  
RE: Claim # 47-8041-205  
AMOUNT \$ 5,559.51

Micah Spacek  
C/O King County Clerk's Office  
516 3<sup>rd</sup> Ave, 6<sup>th</sup> Floor  
Seattle, WA. 98104  
AMOUNT \$ 7,201.75  
~~87,701.75~~

Please pay Bettejane Hargrove and Micah Spacek before State Farm.

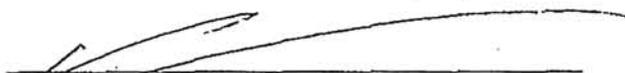
Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

32

1 Restitution for Bettejane Hargrove and State Farm is a joint and several obligation with co-  
2 defendant Justin Miramontez, King County Cause # 12-C-02923-3 SEA, co-defendant Junwynne  
3 Fabia, King County Cause # 12-C-02922-5 SEA, and with co-defendant Victor Prieto, King  
County Cause # 12-C-02924-1 SEA, if convicted and ordered to pay under separate orders.

4 Restitution for Micah Spacek is a joint and several obligation with co-defendant Justin  
5 Miramontez, King County Cause # 12-C-02923-3 SEA, and with co-defendant Victor Prieto,  
King County Cause # 12-C-02924-1 SEA, if convicted and ordered to pay under separate orders.

6 DONE IN OPEN COURT this 22 day of Feb., 2013.

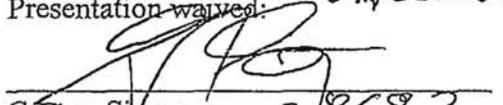
7   
8 JUDGE LAURA MIDDGAUGH

9 Presented by:

10 

11 Deputy Prosecuting Attorney

Copy received; Notice  
Presentation waived: *objection*

12   
13 George Sjursen 28682  
14 Attorney for Defendant

15 Order Setting Restitution  
16 CCN# 1901752

REF# 2120208103

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70108-8-1
	)	
VICTOR FERNANDEZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VICTOR FERNANDEZ  
3827 S. FINDALY ST  
SEATTLE, WA 98118

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF AUGUST 2013.

X *Patrick Mayovsky*